

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24**

COLEGIO DE TECNICOS DE REFRIGERACION Y
AIRE ACONDICIONADO DE PUERTO RICO

Employer

and

Case 24-RC-082214

UNION DE EMPLEADOS DEL COLEGIO DE
TECNICOS DE REFRIGERACION Y AIRE
ACONDICIONADO DE PUERTO RICO

Petitioner

**REPORT AND RECOMMENDATION ON OBJECTIONS
AND CHALLENGES AND NOTICE OF HEARING**

Pursuant to a Stipulated Election Agreement executed by the parties and approved by the undersigned Regional Director on June 11, 2012, an election by secret ballot was conducted on July 3, 2012 among all the systems analysts and secretaries employed by the Employer at its facility in San Juan, but excluding all other all other employees, guards and supervisors as defined by the Act, to determine whether or not said employees desired to be represented for the purpose of collective bargaining by Union de Empleados del Colegio de Técnicos de Refrigeración y Aire Acondicionado de Puerto Rico (Petitioner or Union).

The tally of ballots made available to and distributed to the parties at the conclusion of the election revealed the following:

Approximate number of eligible voters	4
Void ballots	0
Votes cast for Petitioner	1
Votes cast against participating labor organization	1
Valid votes counted	2
Challenged ballots	2
Valid votes counted plus challenged ballots	4

The tally of ballots reflected therein that challenges are sufficient in number to affect the results of the election and that a majority of the valid votes counted plus challenged ballots have not been cast for the Petitioner.

THE CHALLENGES

The Union challenged the vote of Elba Z. Villegas Sanchez (Villegas) claiming she is a "supervisor" and/or a "confidential employee". The Employer challenged the vote of Francisco Clemente (Clemente) allegedly because he is "manager".¹ On July 3, 2012, the undersigned Regional Director requested the parties to submit their respective position statements and evidence in support of their respective challenges.

On July 9, 2012, the Union submitted its position claiming that Villegas is a "supervisor" or "confidential employee" whose duties include: 1- contracts services on behalf of the Employer; 2- orders and supervises the independent contractors; 3- enters contracts with third parties on behalf of the Employer; 4- has worked for the employer for more than 20 years; 5- has access to the Employer's bank accounts; 6- regularly orders and assigns work to the other two secretaries; 7- is the only employee with a medical plan that covers her family; 8- has a company cell phone; 9- is the only employee with access to the safe where money and important documents are stored; 10- is responsible for the petty cash; 11- authorizes reimbursements; 12- acts as Executive Secretary for the Governing Board meetings; 13- manages the group medical plan of the employees, members of the Governing Board and technicians.

On July 10, the Employer submitted a statement in support of its challenge of Union Representative Clemente's vote. The Employer's position is that Clemente is a "managerial employee". The Employer contends that Clemente's duties include: 1- is supervised directly

¹ Francisco Clemente is the "Representative" of the Union who signed the Stipulated Election Agreement

by the Employer's president and reports exclusively to him; 2- has discretion to determine his work assignments and has the authority to give orders and instructions to the other three employees; 3- might unlawfully influence the free choice of his wife, who is one of the four employees working for the Employer; 4- is not required to clock in or clock out, unlike the other employees; 5- is privileged with six weeks of vacations; 6- works in a private area, separated from the rest of the employees; and 7- the Employer's president and Clemente's wife have the exclusive access to his work area.

Since the challenges to the ballots of both Villegas and Clemente raise substantial and material issues of fact, it is recommended that a hearing, as set forth below, be held to consider the issues raised by these challenges.

THE OBJECTIONS

On July 10, the Union submitted its objections to the election consisting of three numbered objections. The first Objection concerns the Employer's alleged failure to post the Election Notice within 72 hours prior to the election; the second objection is that because the Employer's observer co-signs the entity's payroll checks, he unlawfully influenced the decision of voters; and the third objection is that the Employer's observer unlawfully coerced the free choice of the voters by calling each voter by name and giving instructions on when to vote.

Objection No. 1

In support of the first objection, i.e. the failure to post the Election Notice, the Union claims that the Election Notice was not posted before July 2. The Employer denied that it had untimely posted the Election Notice claiming instead that the Notice of Election was posted as soon as it arrived by mail. Additionally, the employer presented evidence that the Union's president was absent due to a work related accident and therefore, not at the

Employer's facility during the notice posting period,² so that, presumably, he had no direct evidence that the posting of the Notice of Election was untimely.

In a letter dated June 22, 2012, the Regional Director explained the following.

"Section 103.20 of the Board's Rules and Regulations requires employers to post the Board's official Notice of Election in conspicuous places at least 3 working days . . . prior to the day of the election. Therefore, the enclosed notices must be posted prior to 12:01 a.m. on June 28, 2012. Failure to comply with this requirement is grounds for setting the election aside whenever proper and timely objections are filed."

In support of this allegation the Union offers witnesses with personal knowledge of the events. The Union specifically notes that the Election Notice was not posted until after July 2, clearly in violation of the aforementioned rule.

As it appears that substantial and material issues of fact have been raised by this Objection which can best be resolved by record testimony, I shall direct that a hearing be held with respect to whether or not the Employer timely complied with its obligation to post the Notice to Employees as set forth in Section 103.20 of the Board's Rules and Regulations.

Objections No. 2 and 3

As noted, Objections no. 2 and no. 3, essentially claim that the conduct and job position of the Employer's observer could have unlawfully influenced the voters' free choice because he co-signed the entity's payroll checks and called each voter by name, giving them instructions on when to vote. Other than its claim that the observer in question signed the employee's payroll, the Union did not submit any evidence to establish that he occupied a supervisory and/or managerial position with the Employer. In *Brinks*,³ the Board held that an observer who told approaching voters to vote for the union acted unlawfully and said

² The evidence indicates that the Union's president was under medical treatment and recommended not to work until July 7, 2012.

³ *Brinks, Inc.*, 331 NLRB 46 (2000).

conduct warranted the election to be set aside. However, unlike *Brinks'* observer, in our case the Union merely contends that the observer called each employee by name to vote at a specified time. The Union does not offer any theory or specific contention on how the observer's conduct influenced the voters. Moreover, an observer telling employees to "get [named employee] to come to vote" was not deemed by the Board as unlawful electioneering absent evidence that such conduct influenced the vote of any employee.⁴ For this reason, I recommend that the Union's objections Nos. 2 and 3 be overruled.

RECOMMENDATION

It is hereby recommended that the Union's and the Employer's challenges to the ballots of Elba Z. Villegas Sanchez and Francisco Clemente, respectively, be set for hearing to determine the issues raised by these challenges. It is also recommended that a hearing be held, as set forth below, to consider the issues raised by the Union's Objection No. 1. Finally, it is recommended that the Union's objections Nos. 2 and 3 be overruled in their entirety.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on August 22, 2012 at 9:30 a.m. and continuing on consecutive days thereafter until concluded, at the NLRB Hearing Room, La Torre de Plaza, Plaza Las Américas Mall, Suite 1002, 525 F.D. Roosevelt Ave., San Juan, Puerto Rico, a hearing will be conducted before a duly designated Hearing Officer of the National Labor Relations Board, at which time and place the parties will have the right to appear in person, or otherwise, and give testimony with respect to the Union's and the Employer's challenges to the ballots of Elba Z. Villegas Sanchez and Francisco Clemente, respectively, and by the issues raised by the Union's Objection No. 1.

⁴ *T K. Harvin & Sons*, 316 NLRB 510 (1995).

APPEAL PROCEDURE

Right to File Exceptions: Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8 as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections or challenges and that are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying on that evidence in any subsequent related unfair labor practice proceeding.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on **August 21, 2012**, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than August 21, 2012, 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.⁵ A copy of the exceptions must

⁵ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted

be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. *Once the website is accessed, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.* The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Dated on August 7, 2012, at San Juan, Puerto Rico.



A handwritten signature in cursive script, reading "Marta M. Figueroa".

Marta M. Figueroa
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National Labor Relations Board
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to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.